



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: SRC 97 246 50417

Office: Texas Service Center

Date:

AUG 16 2000

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

Public Copy

IN BEHALF OF PETITIONER:

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

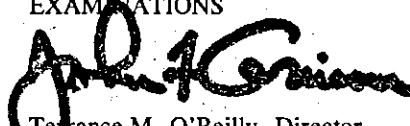
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner, an importer of rattan furniture, seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The director further noted that the record contained insufficient evidence to establish that the foreign entity continues to do business abroad.

On appeal, counsel argued that the beneficiary is an executive for L-1 purposes because she manages a function.

The Associate Commissioner dismissed the appeal reasoning that, based on the evidence presented, the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The Associate Commissioner further noted that the petitioner had provided sufficient evidence to establish that the foreign entity continues to do business abroad.

On motion, counsel states in part that:

The Petitioner stated in its brief to the AAO that the Beneficiary spends the majority of her time planning and organizing the U.S. enterprise's direction relying on the other employees and various independent contractors to conduct the day to day operations of the business. The U.S. enterprise is actively in business and utilizes the services of over twenty (20) independent contractors. These independent contractors work for the U.S. enterprise are the equivalent of approximately four full-time employees.

Clearly the use of over twenty independent contractors evinces that the Beneficiary is not conducting the everyday business of the U.S. enterprise. At this time, the U.S. enterprise has concluded that business would be better served to continue to utilize the services of independent contractors than to hire four full-time employees.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying

managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

The United States petitioner was established in 1995 and states that it is a wholly-owned subsidiary of [REDACTED] located in Motala, Sweden. The petitioner seeks to employ the beneficiary for a three-year period at an annual salary of \$31,200.

At issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

As already discussed extensively by the director and the Associate Commissioner, the record indicates that as of the filing date of the petition, the U.S. entity had two employees, one of whom was the U.S. entity's president. In light of its organizational hierarchy at the time of the filing of the petition, the U.S. entity does not contain the organizational complexity to support a second managerial/executive position.

Counsel refers on motion to an unpublished appellate decision in a case involving an employee of the Irish Dairy Board. In that decision it was held that the beneficiary satisfied the requirements of acting primarily in a managerial capacity because his primary assignment was the management of a large organization using multiple subcontractors to carry out its functions, even though he was the sole direct employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying

duties. The petitioner's claim to utilize contracted support services does not demonstrate managerial capacity. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not overcome the decision of the Associate Commissioner dated September 9, 1999. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The decision of the Associate Commissioner dated September 9, 1999, is affirmed.